Supreme Court, U.S.
FILED
DEC 9 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1077

HERBERT NAGELBERG AND VIVIENNE NAGELBERG,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY ROTHBLATT
Attorney for Petitioners
232 West End Avenue
New York, New York 10023
212 787-7001

STEPHAN H. PERKIN
On the Brief

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Case	5
Reasons for Granting Writ	7
Conclusion	17
Appendix A—Opinion of Court of Appeals	1a
Appendix B—Judgment of Court of Appeals	6a
Appendix C—Excerpts from Trial Record	7a
Appendix D—Excerpts from Government's Court of Appeals Brief	9a

Cases Cited

Brown v. *United States*, 370 F.2d 242	14
Bruton v. *United States*, 391 U.S. 123	8
Gebhart v. *United States*, 392 F.2d 173 (9th Circuit, 1968)	11
Lack v. *United States*, 348 F.2d 763	14
Michelson v. *United States*, 335 U.S. 469	7
Miranda v. *Arizona*, 384 U.S. 436	12, 13
Murphy v. *Waterfront Commission*, 378 U.S. 52 (1963)	10

	PAGE
Procter v. *United States*, 404 F.2d 819 (D.C. Cir. 1968)	11
Spencer v. *United States*, 385 U.S. 554, 561	14
United States v. *Deaton*, 381 F.2d 114	14
United States v. *Fox*, 403 F.2d 92, 102-103 (2d Cir. 1968)	11
United States v. *Johnson*, 382 F.2d 280	14
United States v. *Kelly*, 349 F.2d 720 2d Cir. (1965), cert. den. 384 U.S. 947	9
United States v. *Palumbo*, 401 F.2d 270 cert. den., 397 U.S. 947 (1969)	15
United States v. *Parentign*, 299 F.2d 486, 489, 2d Cir. (1962)	11
United States v. *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968)	11
Walder v. *United States*, 347 U.S. 62 (1959)	11, 12
Wheeler v. *United States*, 382 F.2d, 898 (10th Cir. 1967)	11

Other

McCormick, *Evidence*, sec. re.	13, 14
Uniform Rules of Evidence, Rule 21	13
Model Code of Evidence, Rule 106	13

IN THE

Supreme Court of the United States

October Term, 1970

GERSON NAGELBERG and VIVIENNE NAGELBERG,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 9th day of November, 1970, which affirmed a judgment of conviction upon the verdict of a jury before the Honorable Jack B. Weinstein, in the United States District Court for the Southern District of New York.

Petitioner Vivienne Nagelberg was convicted on two separate violations of Sections 173 and 174, Title 21 United States Code, and conspiracy to violate the same.

Petitioner Gerson Nagelberg was convicted of a violation and conspiracy to violate the above mentioned statutes.

The Opinion Below

The opinion of Circuit Judge Smith, Circuit Court of Appeals for the Second Circuit, in this case has not yet

been reported, but is set forth in Appendix A, *infra*, page

Jurisdiction

The Judgment of the Circuit Court of Appeals was entered on the 9th day of November, 1970, Appendix B, *infra*, page 6a. No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit; nor have any extensions of time been gained in which to file this petition. Jurisdiction of this Court is invoked under Title 28 Section 1254 (1), United States Code.

Questions Presented

1. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's ruling on a motion to sever Appellants' trial where the joinder of the defendants intrinsically prejudiced the individual rights of each defendant to a full, effective, and fair defense?

2. Whether the Circuit Court of Appeals erred in sanctioning the Government's use of information gained from an unlawfully obtained and duly suppressed statement of petitioner Vivienne Nagelberg in its cross-examination of the petitioner Vivienne Nagelberg and ultimately in rebuttal of petitioner's testimony?

3. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's curative instructions with regard to testimony concerning other crimes of Gerson Nagelberg which had improperly come before the jury, and where Gerson Nagelberg has been barred from effective cross-examination as to this testimony?

4. Whether the Circuit Court of Appeals erred in sanctioning the action of the District Judge in allowing cross-examination concerning Gerson Nagelberg's prior criminal record when the purely prejudicial nature of such examination would outweigh the probative value of the testimony?

Statutes Involved

21 United States Code 473

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amend-

atory of, or in substitution for, such sections. Any narcotic drug which is foreited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

21 United States Code 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

18 United States Code 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Statement of Case

On June 19, 1970, upon the verdict of a jury before the Honorable Jack B. Weinstein in the United States District Court for the Southern District of New York, judgments of conviction were entered against Vivienne and Gerson Nagelberg.

Vivenne Nagelberg was convicted for two separate violations of Sections 173 and 174, Title 21 of the United States Code and a conspiracy to violate the same. Gerson Nagelberg was convicted for a violation and a conspiracy to violate the aforementioned statutes.

Gerson Nagelberg received a sentence of fifteen years and $15,000 fine under the third (conspiracy) count and ten years under the first count; the sentences to run concurrently.

Vivienne Nagelberg received sentences of fifteen years and a fine of $15,000 on the third count and five years on

each of the first two counts; the sentences to run concurrently.

In a pre-trial motion, Petitioner Gerson Nagelberg moved the Court for severance on the grounds that his Co-Petitioner's extrajudicial statement would give rise to a deprivation of his Sixth Amendment right of confrontation and that the relationship of the petitioners in a joint trial would prejudice their individual defenses and rights. Said motion was denied by the Court.

At trial, counsel for petitioner Gerson Nagelberg moved the Court *in limine* to enjoin and restrain the prosecution from cross-examination as to Gerson Nagelberg's prior criminal record. Counsel for Gerson Nagelberg contended that the disclosure of said petitioner's prior criminal record would be so prejudicial as to deny him his right to testify on his own behalf, the probative value of his testimony outweighing the prejudicial value of disclosure of his prior record. The Court's adverse ruling was clearly prejudicial to the rights of Gerson Nagelberg.

During trial the Government called as a rebuttal witness, Jean Claude Benichou and elicited testimony on the stand which the Government had solely obtained from an unlawful and duly suppressed statement by Vivienne Nagelberg.

Witness Benichou, called solely to testify in rebuttal to Vivienne Nagelberg's testimony, ignored warnings of the Court and the Government, and testified as to Gerson Nagelberg and his prior criminal acts. Said testimony came in against Gerson Nagelberg on repeated instances, including a reading of the witness' grand jury testimony ineffectively redacted as to any mention of Gerson Nagelberg.

Reasons For Granting The Writ

1. Question One relates to the unavoidable prejudice to the defenses and rights of the petitioners tried jointly. Question Three relates to the actual prejudice sustained by Gerson Nagelberg.

Vivienne Nagelberg chose to take the stand on her own behalf. Consequently, the Government called Jean Claude Benichou to the stand to testify solely in rebuttal to the testimony of Vivienne Nagelberg. Because of the relationship of the petitioners—man and wife, and their history of working together as narcotics agents, Mrs. Nagelberg in asserting her full defense and attesting to her experiences as a narcotics agent mentioned her husband in the natural thrust of delivering complete and credible testimony.

The actions of the Court reflected the futile effort to avoid prejudice and unfairness to either defendant.

When the Government was interrogating Vivienne Nagelberg with reference to Benichou, the Defense objected. The Government explained to the Court that it would call witness Benichou to the stand for the sole purpose of rebutting the testimony of Vivienne Nagelberg. Solely on these grounds the Court accepted Benichou's testimony concerning former criminal acts not under indictment of Vivienne Nagelberg (Appendix Pg. 6a). The evidence was permitted by the Court as an exception to the rule that the prosecution may not introduce evidence of other crimes of the accused (*Michelson* v. *United States*, 335 U.S. 469). The Court made this exception on the Government's assurance that the testimony would only be presented in specific reference to Vivienne Nagelberg.

But as the Court noted, the testimony of Benichou clearly brought inadmissible evidence in reference to Gerson Nagel-

berg to the attention of the jury and "did not allow the full force and effect of the cross-examination to be understood because it turned out a little abstractly."

The Circuit Court failed to consider the applicability of *Bruton* v. *United States* (391 U.S. 123). The whole premise and introduction of Benichou's testimony and the repeated warnings from the Government and the Court to Benichou to limit his references to Vivienne Nagelberg made effective cross-examination on behalf of Gerson Nagelberg impossible.

The Court struck the references to Gerson Nagelberg by Benichou. Therefore, cross-examination could not be extended either in depth or particularity to Benichou's testimony, otherwise the errors *recognized at the trial by the court and the Government* in both of their repeated warnings would have been exacerbated and amplified. Furthermore, if the cross-examination of Benichou on behalf of Gerson Nagelberg was more specific, resultant testimony might have in substance waived Gerson Nagelberg's objection to the original references to him in the direct examination. Accordingly, the circumstances of this testimony did *not* make Benichou available for full and effective cross-examination.

Gerson Nagelberg had moved for severance, particularly in light of incriminating reference within his wife's statement and the *Bruton* problem. The Government asserts that the issue of severance became moot upon suppression of her statement. Benichou's testimony, however, was a fruit of this statement (See No. 2 below) and directly involved its contents.

Thus, while Vivienne Nagelberg pursued her defense in full and objected properly to the Government's leading of the witness Benichou, the defense of Gerson Nagelberg was on

the horns of a dilemma and jeopardized by the pursuant developments. Severance would have avoided this dilemma and its prejudicial consequences to the defense of Gersen Nagelberg.

Furthermore, the circumstances and facts of this case were such that petitioners were equally liable to guilt by association. The circumstances of petitioners', marriage, common residence, and their separate respective positions even in the allegations of the indictment made their joint trial unfair and prejudicial to their separate, individual defenses. In *United States* v. *Kelly*, 349 F.2d 720 2d Cir. (1965), cert. den. 384 U.S. 947, the Second Circuit held that the District Court erred in denying a motion for severance. Among the considerations influencing the decision was the potentiality of guilt by association, where the accumulated evidence involving the defendants was such that no amount of cautionary instructions could have undone any harm committed to any single defendant.

Accordingly in this case, errors and prejudice against one petitioner bore virtually equally against the other. The dilemma of and failure in limiting Benichou's testimony only attests to the prejudice consequential to the joinder of petitioners at trial.

Benichou's testimony in particular reference to Gerson Nagelberg was so prejudicial as to deny him a fair and impartial trial. The joinder of petitioners compounded the errors committed at trial and precluded a full, effective, and fair defense for each of the petitioners individually.

This Court should consider the criteria under Rule 14 of the Federal Rules of Criminal Procedure as applicable here, and the District Court's failure to recognize the

prejudice, potential, and actual to these defendants, resultant in their joinder at trial.

2. Question Two relates to the Government's use of information unlawfully obtained and duly suppressed at trial in the cross-examination of defendant Vivenne Nagelberg and ultimately in the rebuttal of her testimony by the witness Jean Claude Benichou.

The Circuit Court incorrectly applied the independent source exception to the "fruit of the poisonous tree" doctrine. Although an independent source might exist, the burden of proof is on the Government to establish that their evidence is not tainted, that an independent legitimate source exists, (*Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1963)).

The Government failed to meet this burden at trial. The "poisonous tree" doctrine goes to the lawfulness of government law enforcement practices and stands to deter improper practices. After the Government obtained Vivenne Nagelberg's statement concerning prior narcotics transactions with the witness Benichou; after this statement was duly suppressed at trial; after the Government brought Benichou from Mexico to testify as to these prior transactions; the Government contended in its brief to the Circuit Court that Vivenne Nagelberg's testimony was its [possible] independent source and that "it was merely fortuitous that Benichou was readily available," (Appendix Pg 9a). *Actually*, that Benichou was available having come from Mexico is more than "fortuitous." Instead, the information within Vivienne Nagelberg's suppressed statement led the Government to Benichou, provided the basis of his testimony, and in effect, brought into the proceedings

expressly the suppressed information within Petitioner's statement.

The specific cross-examination of Vivenne Nagelberg went to the heart of her extrajudicial statements, already suppressed. The *possibility* that the Government had an independent source is not sufficient to remedy the taint. The Circuit Court failed to make considerations as to the actuality of the source of Benichou's evidence.

In *United States* v. *Schipani*, 289 F. Supp 43 (E.D.N.Y. 1968), the District Court treated a similar situation

> [A] more appropriate simile than the "fruit of the poisonous tree" is, perhaps, that of a tree nourished by both pure and polluted waters. In this circuit [the Second] the tendency has been to find any appreciable pollution sufficient to taint the fruit.
>
> If the evidence is discovered as a result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have sufficed to uncover the evidence.

The Second Circuit has in the past upheld this reasoning, otherwise, "Such a rule would relax the protection of [Fifth Amendment rights, and] the right of privacy . . . . The test must be one of actualities, not possibilities," *United States* v. *Paroutian*, 299 F.2d 486, 489, 2d. Cir. (1962).

The Second Circuit Court of Appeals decision in this case flies in the face of these precedents. Although this Circuit has in other cases effectively repudiated the viability of *Walder* v. *United States*, 347 U.S. 62 (1959),*

---

* See *United States* v. *Fox*, 403 F.2d 92, 102-3 (2d Cir. 1968). *Walder* has been similarly treated by other Circuit Courts: *Procter* v. *U.S.*, 404 F.2d 819 (D.C. Cir. 1968); *Gershart* v. *U.S.*, 392 F.2d 173 (9th Cir. 1968); *Wheeler* v. *U.S.*, 382 F.2d, 998 (10th Cir. 1967).

the Court's conclusion reflects an implicit reliance on the *Walder* holding. *Miranda* v. *Arizona*, 384 U.S. 436, did not explicitly overrule *Walder*, although *Miranda* has been applied by some Circuit Courts to effectively repudiate the *Walder's* holding.

Accordingly, this Court is presented with a mis-application of the law surrounding the "fruit of the poisonous tree" doctrine with the resultant consequences of justifying the use of unlawfully obtained evidence and the denial of Due Process to the Petitioners.

3. The Court of Appeals did not hold on the admissibility of the statement of Vivienne Nagelberg (See Appendix at p. 4a, n. 1).

The Court, however, mistakenly argues that it was probably admissible.

At the trial, the Court offered the Government an opportunity to brief the issue. The Government declined, and after a full hearing, the statement was duly suppressed.

The Government is correct in asserting that United States Constitution does not apply to foreign officials, but Mortimer Benjamin, a United States Narcotics Bureau Agent, testified that it was he who suggested that Vivienne Nagelberg be detained and questioned.

Agent Benjamin had been involved in the investigation of the transaction occurring in Canada, and was present there in his official capacity. Although fully aware of Mrs. Nagelberg's American Citizenship, he nevertheless questioned her without first advising her of her constitutional rights. Appendix pg. 8a).

A United States government official was involved in this investigation, focusing on a suspect who even at that time was under investigation for alleged narcotics trafficking. The situation clearly falls under *Miranda* v. *Arizona*, 384 U.S. 436, and the trial Court ruled properly.

The Circuit Courts' rule as applied to these facts would enable a United States law enforcement officer to interrogate an American suspect *without* the protection of *Miranda*, as long as the suspect was interrogated across the border in the presence of a foreign official, who also had an interest in the accused.

Although the Circuit Court did not rule definitely, its suggestion as to the admissibility of Vivienne Nagelberg's statement should be corrected and clarified by this Court.

4. Question four relates to the trial court's denial of Appellant Gerson Nagelberg's motion *in limine* to restrain the prosecution from cross-examination as to his prior criminal record.

Commentators and scholars have recognized this dilemma for the accused at trial with a prior criminal record. Professor McCormick in his treatise on Evidence recommended in 1954:

> "On balance it seems that to permit . . . one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane, and expedient solution than the prevailing practice."
>
> McCormick, Evidence, sec. re. See also, Uniform Rules of Evidence, Rule 21; and Model Code of Evidence, Rule 106.

At the date of publication of McCormick's treatise, only Pennsylvania provided under certain circumstances for the prohibition of reference to an accused's prior record. Since that time, however, some Federal courts have adopted a similar position.

The Supreme Court in *Spencer* v. *Texas*, 385 U.S. 554, 561, ruling on the constitutionality of multiple offender statutes and proceedings, offered in dicta:

> "The defendant's interests are protected by . . . the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence."

In applying this doctrine, Federal jurisdictions have differed with regard to circumstances and standards in determining the admissibility of prior criminal records into evidence.

The District of Columbia Circuit in interpreting the D.C. Criminal Code has strictly upheld the discretionary power of the trial judge to restrain the prosecution from cross-examining an accused in regard to his prior conviction when undue prejudice would result against the defendant's case.

> *Luck* v. *United States*, 348 F.2d 763;
> *Brown* v. *United States*, 370 F.2d 242.

Likewise, the Second Circuit has held that the trial court has similar powers, depending upon balancing all relevant factors to determine whether the probative value of evidence of other crimes is out-weighed by its prejudicial effect.

> See, *United States* v. *Deaton*, 381 F.2d 114;
> *United States* v. *Johnson*, 382 F.2d 280.

In *United States* v. *Palumbo*, 401 F.2d 270, *cert. denied*, 397 U.S. 947 (1969), the Second Circuit specified the considerations pertinent to the balance of this decision by the trial court:

> "In short, we hold that a trial judge may prevent such use, if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the jurors improperly."

United States v. *Palumbo*, *supra* at p. 273.

The trial court denied Gerson Nagelberg's motion on the grounds that his testimony as to prior conduct might be in conflict with transaction involved in his former conviction. This exercise of the Court's discretion was in effect a blanket denial of the motion on merely a supposition as to the potential content of Gerson Nagelberg's testimony.

The trial court did not take into consideration the guidelines in *Palumbo* and foreclosed the possibility of Gerson Nagelberg presenting evidence with significant probative value in his own defense. The possibility of Gerson Nagelberg's testimony coming into conflict with facts met by a government objection at the proper time, and then the Court's removal of the restraint on cross-examination as to Nagelberg's prior record.

Instead the Court effectively barred Gerson Nagelberg from testifying due to the propensity of his prior criminal record to influence the jury improperly and prejudicially, while serving no relevant or constructive purpose in its possible introduction. With the government free to bring

out his prior record, Gerson Nagelberg could not afford without unduly and precariously prejudging his own case, to take the stand in his own behalf.

The trial court's denial of Gerson Nagelberg's motion *in limine* limited the effective scope of his defense and thus deprived him of his rights secured under the Fifth Amendment to due process in fair and impartial proceedings.

The Circuit Court said that the discretion in the trial court is defined in narrow limits. Nowhere, however, did the court apply or interpret these standards to the case at issue.

Moreover, the Supreme Court has not previously considered this issue. Although the District of Columbia and the Second Circuits have adopted the practice of discretionarily enjoining the prosecution from cross-examination of a witness as to his prior criminal record, when the unfair and prejudicial nature of such examination would outweigh the probative value of the testimony.

This law is not consistently established among the various Federal courts.

By the District Court's denial of Gerson Nagelberg's motion *in limine*, he was denied his due process of law under the Fifth Amendment.

CONCLUSION

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY ROTHBLATT
Attorney for Petitioners

STEPHAN H. PESKIN
On the Brief

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 256, 257—September Term, 1970.

(Argued September 18, 1970 Decided November 9, 1970.)

Docket Nos. 35068, 35210

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERSON NAGELBERG and VIVIENNE NAGELBERG,

Appellants.

Before:

FRIENDLY, SMITH and HAYS,

Circuit Judges.

Appeal by Gerson and Vivienne Nagelberg from judgment of conviction and sentence on charges of conspiracy to transport narcotics from Montreal, Canada to New York and illegal purchase and receipt of heroin, on trial to the jury in the United States District Court for the Southern District of New York, Jack B. Weinstein, *Judge.** Affirmed.

HENRY B. ROTHBLATT, New York, N. Y. (Stephan H. Peskin and Ronald H. Schectman, New York, N. Y., of counsel), *for Appellants.*

---

* United States District Judge for the Eastern District of New York, sitting by designation.

Appendix A. Opinion of Court of Appeals

Jonas Wein, Assistant U. S. Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Andrew J. Maloney and Gary P. Naftalis, Assistant U. S. Attorneys, of counsel), *for Appellee*.

Smith, *Circuit Judge*:

Gerson and Vivienne Nagelberg, husband and wife, were jointly tried and convicted on charges of conspiracy to import narcotics from Canada and on one substantive count of illegal purchase and receipt of heroin, and Vivienne was convicted alone on another substantive count, in the United States District Court for the Southern District of New York before Jack B. Weinstein, *Judge*, and a jury. We find no error and affirm the judgment.

Appellants' convictions arose from a scheme to smuggle into the United States narcotics seized in Canada by Canadian enforcement officials, and purloined by corrupt Canadian officers for eventual distribution here. Existence of the conspiracy and delivery of heroin to appellants in New York was amply established by the testimony of Mourant, one of the corrupt Canadian officers. Appellant Vivienne Nagelberg took the stand in her own defense and testified that she had never been criminally involved in narcotics traffic, and on the contrary, had actually operated at all times as an undercover agent for the federal government in the narcotics area. On rebuttal, the government put on the stand one Bertichon, who testified as to his prior criminal involvement with appellant Vivienne Nagelberg in 1966 and 1967. While in Canada, Mrs. Nagelberg had given a

statement to Canadian authorities implicating herself criminally with Benichou. At trial, Judge Weinstein suppressed that statement since the authorities had not given her the *Miranda* warnings, and although such warnings are not required under Canadian law, an American agent was extensively involved in her questioning and detention.

On appeal, appellants raise four points:

1. Benichou's testimony was inadmissible as fruit of the poisonous tree, since Benichou originally came to the attention of federal authorities through the suppressed statement.

2. The trial court improperly refused to grant appellants' motion for severance.

3. Appellant Gerson Nagelberg was prejudiced by references made by Benichou to his previous criminal activity, even though the trial court admonished the jury to disregard these remarks.

4. The trial court erred in denying appellants' motion to restrain the prosecution from cross-examining Gerson concerning his prior criminal record if he were to take the stand in his own defense.

As to appellants' first point, it is well established that the fruit of unlawful evidence may nevertheless be admitted if the government demonstrates that the evidence would have come to its attention from an independent source. See Maguire, "How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule," 55 J. Crim. L.C. & P.S. 307, 313-17 (1964). Here, even if the statement obtained from Vivienne Nagelberg in Canada were properly suppressed, there existed a number of independent sources

of information which would have led the government to Benichou. For one thing, Vivienne Nagelberg's own trial testimony revealed her connection with Benichou after she knew that her statement made in Canada had been suppressed. Any taint that may have existed was therefore removed by appellant's voluntary statements. Cf. *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963). Furthermore, Canadian authorities knew of Benichou's criminal activity as a narcotics trafficker before Vivienne Nagelberg's detention. Benichou's testimony on rebuttal was, therefore, admissible.[1]

Appellants are also incorrect in arguing that the motion to sever should have been granted. The charges on which defendants were tried arose from the same transactions, Fed. R. Crim. P., Rule 8(a), and appellants have failed to establish any tangible evidence of prejudice arising out of their joint trial.

The third ground urged for reversal, that Gerson Nagelberg was prejudiced by inadvertent references to his prior criminal activity by Benichou during his rebuttal testimony,

---

[1] Moreover, the statement was probably admissible and quite likely should not have been suppressed in the first place. The *Miranda* rule has no application in a case such as this, where the arrest and interrogation were by Canadian officers interested in Canadian narcotic and immigration offenses under their investigation. There is no showing that the statement was coerced or taken in violation of the laws of Canada. There is no claim of "rubbing pepper in the eyes," or other shocking conduct. The presence of an American officer should not destroy the usefulness of evidence legally obtained on the ground that methods of interrogation of another country, at least equally civilized, may vary from ours. *Birdsell* v. *United States*, 346 F.2d 775, 782 (5 Cir. 1965), *cert. denied*, 382 U.S. 963; *Brulay* v. *United States*, 383 F.2d 345 (9 Cir. 1967); *Stonehill* v. *United States*, 405 F.2d 738 (9 Cir. 1968).

is premised on the general rule that the prosecution may not introduce evidence of a defendant's bad character or prior criminal activity. This rule is inapplicable, however, when the defense has introduced evidence of defendant's good character, and the prosecution is merely rebutting that claim. McCormick, *Law of Evidence* § 157 (1954). Here, an examination of Vivienne Nagelberg's testimony reveals that she was testifying as to the good character of her husband, as well as of herself. Thus any references by Benichou to the criminal conduct of Gerson Nagelberg, whether they were intentional or inadvertent, constituted proper rebuttal to the testimony of Vivienne Nagelberg on her husband's behalf.

As to appellants' fourth and final claim, the ruling by the trial court refusing to restrain cross-examination of Gerson on his prior criminal record if he should take the stand was well within the court's discretion. See *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967); *United States* v. *Cuadrado*, 413 F.2d 633 (2d Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). Appellants' reliance on *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969), is clearly misplaced, for this court emphasized in that case that the trial court possessed power to restrain such cross-examination within rather narrow limits.[2] No abuse of this discretion has been demonstrated in this case.

Judgment affirmed.

---

[2] "In any event, we do not accept the broad proposition that a trial judge has no discretion to bar use of prior convictions to impeach a defendant. In short, we hold that a trial judge may prevent such use, if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly." 401 F.2d 270 at 273.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY
HON. J. JOSEPH SMITH
HON. PAUL R. HAYS

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

GERSON NAGELBERG and VIVIENNE NAGELBERG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Excerpts From Trial Record

• • • • •

(624) The Court: Now, with respect to this witness' references to Mr. Nagelberg, I am a little bit disturbed by that but I don't see that there is sufficient for a mistrial here. If the defendant, Mr. Nagelberg, would like, I will inform the jury and put it as strongly as I can that nothing this witness says or said can be used against Mr. Nagelberg; his testimony is coming in only on the credibility of Mrs. Nagelberg and is not itself evidence of any guilt on the part of either.

• • • • •

(493) Q. And did you suggest the interrogation? A. At which time?

(494) Q. In Montreal. A. I suggested, yes, I guess you would say that.

Q. You knew she was a United States citizen, didn't you, sir? A. Yes, sir.

(495) Q. She said she did it of her own free will at the end? But at the beginning, it doesn't say she was advised to remain silent, that she didn't have to make a statement or that she could have an attorney if she wanted one; it doesn't say that? A. That is correct.

Q. As a matter of fact, neither you or the Sergeant, Sgt. Plante, told her that, did you? A. Not at that time, no, sir.

Q. And not before the statement was signed? A. Not the complete Miranda, no.

Q. So that she signed—she was an American citizen up there, is that right? A. In Canada, yes, sir.

Q. And you were an agent of the American Government? A. That is correct.

• • • • •

APPENDIX D

Excerpts From Government's Court of Appeals Brief

Perhaps the best answer to any "fruit of the poisonous tree" argument is that Vivenne Nagelberg by her own trial testimony revealed her connections with Benichou prior to his taking the stand and after she knew the Canadian statement was suppressed.* Surely this "independent source" entitled the government to call Benichou in rebuttal and it was merely fortuitous that he was readily available.

---

* Compare *Harrison* v. *United States*, 392 U.S. 219 (1968) where the defendant was "impelled" to testfy after an illegal confession had been admitted against him.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1077

GERSON NAGELBERG AND VIVIENNE NAGELBERG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. 1a–5a).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1970. The petition for a writ of certiorari was filed on December 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, there was an unlawful use of a suppressed statement.

2. Whether inadvertent references to Gerson Nagelberg by a witness were prejudicial in light of the judge's instructions.

3. Whether Gerson Nagelberg's motion for severance was properly denied.

4. Whether the court properly refused to restrain the government from cross-examining Gerson Nagelberg as to his prior narcotics convictions if he chose to testify.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to import narcotics into the United States from Canada and of buying narcotics, in violation of 21 U.S.C. 173 and 174. Petitioners were sentenced to concurrent prison terms, of which the longest was fifteen years, and were each fined $15,000. The court of appeals affirmed (Pet. App. 1a–5a).

At trial, it was established by the testimony of Roger Mourant, a Canadian policeman, that he and another Canadian policeman, Kwasowsky, had smuggled one ounce of heroin from Canada into the United States and sold it to Vivienne Negelberg. (Tr. 129–135).[1] On another occasion, Mourant came to the United States alone and sold five and one-half pounds of heroin to both petitioners (Tr. 164–170). Mourant

[1] "Tr." refers to the trial transcript lodged in three volumes with this Court.

also testified that he, Kwasowsky, and petitioners had discussed plans for bringing additional quantities of narcotics into the United States (Tr. 139, 142, 144–146, 153–154).

Vivienne Nagelberg, in her own defense, testified that neither she nor Gerson Nagelberg, her husband, had ever purchased narcotics from the Canadian policemen or made any arrangements with them to smuggle narcotics into the United States (Tr. 573–575). She also claimed that she and her husband had worked as informants for the Federal Bureau of Narcotics (Tr. 551–558), and that her relationship with Mourant and Kwasowsky arose in Montreal, where she was following a federal agent's instructions (Tr. 566–570). She testified that she was supposed to meet Claude Benichou, with whom she had previous contacts, at a Montreal airport together with two French narcotics couriers (Tr. 567–569). However, Canadian authorities at the airport had arrested the two French couriers, became suspicious of her, and detained and questioned her (Tr. 23–27, 47–48, 53), as a result of which she never met Benichou (Tr. 570). She became acquainted with Mourant and Kwasowsky, she said, when she was released and they were ordered to escort her to the United States border for deportation (Tr. 558–560, 569–570).

The questioning by Canadian authorities was done, in part, at the suggestion of a federal narcotics agent, who was present during most of the questioning and when Mrs. Nagelberg's statement was taken. In response to the questioning, Mrs. Nagelberg said that

she would cooperate with the Canadian authorities in obtaining evidence against Benichou (Tr. 54–57). In her written statement (R. No. 48, Exh. K, Defendant's Affidavit in Support of Motion for Bail),[2] she said that she had met with Benichou in December 1966 at a friend's apartment in New York, and that in March 1967 she called Benichou from the Chateau Champlain in Montreal but was unable to reach him. The warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, for custodial questioning occurring in the United States were not given at the time of this questioning (Transcript of June 12, 1970, 493–496),[3] and accordingly the written statement was suppressed by the trial court (Tr. 517).

Subsequent questioning on cross-examination of Mrs. Nagelberg referred to two meetings with Benichou. In response, she admitted her connection with him, but denied purchasing narcotics from him in December 1966 and denied that he came to her Chateau Champlain hotel room in March 1967 (Tr. 595–599).

Benichou was called in rebuttal, and testified that in December 1966 he delivered two pounds of heroin to Vivienne Nagelberg at her New York apartment (Tr. 603–604) and that in March 1967 he met her in the Chateau Champlain Hotel in Montreal, where he opened a suitcase full of narcotics in her presence

---

[2] "R." refers to the certified record of the proceedings below.

[3] This transcript was omitted from the certified record by the clerk of the court of appeals and we have lodged it with the Clerk.

(Tr. 605-606). Although he had been instructed by the Assistant United States Attorney to make no reference to Gerson Nagelberg in his testimony (Tr. 602), Benichou said that "Jerry" (Gerson Nagelberg) was present on these occasions (Tr. 603, 607). The court instructed the jury that Benichou's testimony was admitted only to impeach the credibility of Mrs. Nagelberg and that any reference to Gerson Nagelberg was to be completely disregarded (Tr. 653-655).

ARGUMENT

1. Vivienne Nagelberg contends that Benichou's rebuttal testimony was the fruit of her suppressed statement to the Canadian authorities.[4] Since this objection was first raised only after Benichou had testified on direct and cross-examination (Tr. 642-643), the source of the government's information about Benichou was not fully explored.[5] Nevertheless, the record clearly shows that he was known to Canadian authorities as a trafficker in narcotics before Mrs. Nagelberg was arrested (D.A. 19a).[6] Constable Mourant testified that she had told him and Constable Kwasowsky, at their first meeting in Montreal, that Benichou had delivered

---

[4] The court of appeals' suggestion that the district court erred in suppressing the statement (Pet. App. 4a, n. 1) is *dictum*; the statement was in fact suppressed.

[5] In answering post-trial motions by the defense, the government argued that it could be inferred that Mrs. Nagelberg had mentioned Benichou after her initial arrest in non-custodial interviews with a United States agent. It offered to establish such facts at a hearing, but the defense declined the invitation.

[6] "D.A." refers to Defendant's Appendix in the court of appeals, a copy of which we have lodged with the Clerk.

heroin to her (R. 303). Since a prior source of knowledge about Benichou's existence and involvement thus appears, it is unnecessary to reach the question whether the mere fact that the name of a potential witness was obtained from his being mentioned in a suppressed statement would justify exclusion of any testimony by that witness. It may be noted, however, that the courts have ruled to the contrary. *Smith* v. *United States*, 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954.

Mrs. Nagelberg testified to her acquaintance with Benichou, and was cross-examined about it, after her statement had been suppressed. Once she had admitted the relationship, but denied that she had purchased narcotics from Benichou in December 1966 or seen him in Montreal in March 1967,[*] Benichou's testimony was proper as impeachment. *Harrison* v. *United States*, 392 U.S. 219, 223, and n. 9). See *Spencer* v. *Texas*, 385 U.S. 554; *Walder* v. *United States*, 347 U.S. 62.

2. Benichou's references to "Jerry" were inadvertently made, after he had been instructed not to mention the husband. The trial court's instructions (Tr. 653–655) were adequate to cure any possible misuse of those references by the jury.

Moreover, as the court below noted, the instructions to disregard the references were more favorable than required. Mrs. Nagelberg testified on direct that she and her husband had worked as informants for sev-

---

[*] This cross-examination did not refer to or reflect her suppressed statement, which referred neither to a purchase of drugs in December 1966 nor to an actual meeting in March 1967.

eral years. Thus, it was proper to show, as to both, activities which were not consistent with their alleged role as informants.[8]

3. Gerson Nagelberg attempts to use the references to him in Benichou's testimony as a basis for the argument that it was error to deny his motion for a severance. As shown above, those references would in fact have been properly admissible against him, but were adequately withdrawn from the jury's consideration. Petitioners, who acted together, were properly tried together. Whatever basis for severance might have existed on the basis of a claim that Mrs. Nagelberg's statement would implicate her husband disappeared when the statement was suppressed.

4. Mr. Nagelberg's request that the court preclude cross-examination as to his prior narcotics convictions if he took the stand was properly denied. The district judge indicated that he favored the rule set forth in *Luck* v. *United States*, 348 F. 2d 763 (C.A.D.C.), but that, since counsel indicated that Mr. Nagelberg would testify that his narcotics activity was as a government agent, proof of prior convictions would be relevant as specifically impeaching his credibility on this point

[8] Since Benichou's testimony was not admitted against Mr. Nagelberg, he was not deprived of any right of confrontation. It may be noted that counsel for Mr. Nagelberg asked the court if he could conduct a general cross-examination of Benichou even though the witness had not specifically referred to Gerson Nagelberg (Tr. 627). The court agreed but warned counsel that he would be responsible for anything Benichou said (Tr. 627). Thus, even though counsel chose later not to cross-examine (Tr. 647–650), it is clear that he had the opportunity to do so.

(D.A. 14a–15a). This ruling was clearly justified. *Spencer* v. *Texas*, 385 U.S. 554, 561.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD L. PETRONELLA,
Attorneys.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971